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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 493

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I. (Reply to Point IV).

The question whether application of the city taxing ordinance to carriers of freight whose intrastate and interstate operations are inseparable violates the commerce clause of the Federal Constitution, even where no proof of undue burden upon interstate commerce appears, affects not only the respondent but thousands of other freight carriers in the City of Chicago similarly situated, and is of far-reaching importance to all state and municipal taxing bodies.

We are replying to respondent's last contention first, because its brief asserts (p. 15) that this case presents no Federal question of any importance, and it would also have

this Court believe that a determination by this Court of the question of the validity of the ordinance under the commerce clause of the Federal Constitution would affect only the respondent and have no far-reaching consequences. The exact contrary is true, however, for as is shown by the Stipulation of Facts in this case there are "upwards of 3,000 individuals, firms or corporations" engaged in the transportation of freight by motor vehicle within the City of Chicago "who are similarly situated with the Defendants" (meaning the respondent) "as to matters and things complained of herein" (R. 10).

Moreover, the City of Chicago, the petitioner herein, as well as every State and municipality in the Nation will be affected by the decision because their power to tax purely local occupations is directly involved. The consequence of the erroneous decision of the Supreme Court of Illinois, if it were to receive the implicit sanction of this Court by not being disapproved, is to strip the several States and their municipal subdivisions of the power to levy occupational taxes upon purely local business in every case where it integrates itself with interstate commerce so as to become inseparably intertwined therewith, despite a total absence of proof that an undue burden upon interstate commerce actually results. This decision, if permitted to stand, will provide a ready avenue for the escape of purely local business from local taxation and would destroy the well established line of demarcation between Federal and State power in the field of taxation.

It is respectfully submitted, therefore, that the case presents a substantial Federal question of sufficient public importance to require its resolution by this Court.

II. (Reply to Point I).

The decision here sought to be reviewed rests solely and explicitly upon the erroneous determination of a substantial Federal question.

Respondent contends (pp. 3-8 of its brief) that the decision below involves no Federal question, hence is not reviewable under Section 1257 (3) of Title 28, United States Code, because it rests upon a construction of the ordinance as limited to intracity transportation and as not intended to apply to interstate commerce at all,—a holding asserted to be a non-federal ground adequate to support the judgment. A conclusive answer to this contention is that the court explicitly recognized that the ordinance as so interpreted was clearly valid under the commerce clause, yet held the ordinance to be invalid as applied to respondent upon the express ground that an undue burden upon interstate commerce was established by a mere showing of inseparability between respondent's local and interstate operations, and without any evidence whatsoever of undue burden. It is difficult to conceive how the decision which invalidates the ordinance can rest upon a construction of the ordinance which if applied would serve to validate it. It would seem to be manifest that the decision of the Supreme Court of Illinois against the validity of the ordinance in its application to the respondent does not rest upon such validating construction at all, but rather upon the erroneous determination by the court of the interstate commerce question. That this is the sole and exclusive basis of the Court's decision clearly appears from the following language of the court's opinion:

> "While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not

make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

"Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee." (R. 29).

This Court has held that it may examine the opinion of the state court to ascertain whether or not a Federal question was raised and passed upon, and whether or not the decision rests upon the determination of that Federal question. (*State of Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98-99; 82 L. ed. 685.)

It is evident from an examination of the court's opinion that this case is one in which the validity of a State statute (ordinance) was drawn in question on the ground of its being repugnant to the Constitution or laws of the United States, and hence comes within the certiorari jurisdiction of this Court under Section 1257 (3) of Title 28, United States Code. It is obvious, further, that respondent's contention that the case does not come within said Section 1257 (3) rests upon its misconception as to the real basis of the court's decision.

While it is true that the case also raised non-federal questions, it is clear from the opinion that none of these was made a ground of decision. It is submitted, therefore, that respondent's claim that the decision rests upon a non-federal ground independently sufficient to support the judgment is entirely without foundation.

The presence of additional non-federal questions in the case constitutes no bar to a review by this Court where, as here, the decision of the state court is based solely upon

the Federal question presented. It is well settled that where the state court explicitly bases its decision solely upon a determination of the Federal question, this Court will review the case even though the state court, consistently with the record, might have based its decision upon adequate non-federal grounds. (*Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 197; 89 L. ed. 173; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98; 82 L. ed. 685; *Grayson* v. *Harris*, 267 U. S. 352, 358; 69 L. ed. 652; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188-189; 60 L. ed. 594.)

We do not dispute the proposition that this Court is bound by the construction placed upon the ordinance by the state court, but this does not mean that this Court is also bound by the state court's decision of the Federal question forming the sole basis of that decision. This Court has frequently asserted that while it will accept the state court's construction of local legislation as conclusive, it will nevertheless examine for itself the Federal question forming the basis of the state court's decision, and indeed is in duty bound to determine the Federal question in accordance with its own judgment. (*Crew Levick Co.* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 294; 62 L. ed. 295; *Storaasli* v. *State of Minnesota*, 283 U. S. 57, 62; 75 L. ed. 839; *Kovacs* v. *Cooper*, 336 U. S. 77; 93 L. ed. 513; *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592, 608-609; 43 L. ed. 823).

In the *Crew Levick* case, for example, this Court accepted as conclusive the state court's construction as to the scope and meaning of the state statute there involved, but refused to follow the state court's decision of the Federal question presented and reversed the judgment.

Likewise, in the following three cases, this Court recognized and accepted the binding force of the state court's

construction of the state statutes involved, but nevertheless proceeded to decide the Federal questions presented (their validity under the commerce clause) in conformity with its own views, affirming the state court judgment in the first cited case but reversing it in the other two. (*Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 21-22; 35 L. ed. 613; *Western Union Telegraph Co.* v. *Alabama,* 132 U. S. 472, 474-475; 33 L. ed. 409; *Illinois Central Railroad Co.* v. *Illinois,* 163 U. S. 142, 152-153; 41 L. ed. 107.)

Respondent contends, further, that since the Supreme Court of Illinois construed the ordinance as applying only to intracity transportation, no Federal question under the commerce clause was presented, citing in support of this proposition the case of *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 46 L. ed. 847. This contention is in effect nothing more than a reiteration of the untenable proposition that a validating construction on one aspect of the case cancels out the effect of the invalidating decision on the basic issue involved. We have already pointed out that the state court's construction of the meaning and scope of the ordinance and its decision as to whether it constituted an undue burden upon interstate commerce represent adjudications upon two separate and distinct issues, the former a matter of local law, the latter a question arising under the Federal Constitution.

Moreover, the case of *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 46 L. ed. 847, does not support the respondent, because there the state court had construed the local statute in favor of the railroad on the interstate commerce question involved, and this Court properly held that its review jurisdiction could not be invoked by the railroad by utilizing as a ground of jurisdiction the question which had been decided in its favor.

III. (Reply to Point II).

The decision of the Illinois Supreme Court constituted a holding upon the Federal question involved in conflict with the applicable decisions of this Court.

Respondent contends that since the state court construed the ordinance to be limited to intracity transportation, the court's decision must be regarded as one sustaining the validity of the ordinance, and that the discussion in the opinion as to the invalidity of the ordinance under the commerce clause as applied to respondent is "mere dictum" (p. 8). The fallacy of this argument lies in treating the construction of the ordinance as the decision of the case. Far from being "mere dictum," however, the court's invalidation of the ordinance under the commerce clause as applied to the respondent is the sole and exclusive point upon which the court rested its decision against the city and in favor of the respondent. In the absence of this so-called dictum, the decision of the Supreme Court of Illinois would have been in favor of the City of Chicago.

On pages 8 and 9 of its brief, respondent refers to the evidence in the record by which it claims to have established inseparability between its intracity and interstate operations. The question presented, however, is not whether the evidence was sufficient to show inseparability, but whether, assuming such inseparability, it was proper for the court to hold the ordinance invalid in its application to respondent in the absence of a showing that the ordinance actually resulted in casting an undue burden upon respondent's interstate business. Inasmuch as the record shows without dispute that the respondent was using each of its trucks daily in intracity transportation (R. 9), it follows that the decision of the Illinois Supreme Court that the City of Chicago is without power to enforce

this ordinance against the respondent rests entirely upon that court's determination (erroneously, we submit,) of the Federal question whether a showing of inseparability, without a showing of undue burden, is sufficient to exempt respondent from local taxation upon its intracity business.

The case of *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; 56 L. ed. 237; (Resp. Br., p. 10), is not pertinent to the case here, because there this Court merely held that a train carrying interstate and intrastate freight at the same time was subject to Federal regulation, notwithstanding that part of its load consisted of intrastate commerce. There is nothing in that decision militating against the power of a city or state to tax intracity or intrastate commerce merely because the taxpayer is also engaged in interstate commerce at the same time. That case involved the applicability of Federal legislation regulating the hours of service of employees in interstate commerce and not the applicability of local legislation taxing only the intracity operations of persons engaged both in intracity and interstate commerce. Here the ordinance contains no regulatory provisions but is purely a revenue measure; nor does it seek to tax the vehicle for its use in interstate commerce, but only for its use in purely local transportation. The fact that the vehicle is used at the same time in carrying both intracity and interstate loads should not permit respondent to escape reasonable taxation upon its local business measured by a reasonable annual tax upon each vehicle used in such purely local operations.

The case of *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. ed. 833, (Resp. Br., pp. 10-12), has already been distinguished in our petition (p. 15). This Court pointed out in that case that the Supreme Court of Indiana construed the ordinance there involved as applying not only to busses engaged in intrastate commerce, and to busses engaged both in intra-

state and interstate commerce, but also to busses operated exclusively in interstate commerce, and it is for that reason that this Court held the local occupation tax void under the commerce clause (277 U. S. 163, at p. 171).

Respondent contends (p. 12) that the ordinance in the case at bar does not distinguish between the transportation of freight transported from point of origin to point of destination within the city and the movement of freight from point to point within the city as a segment of a longer journey in interstate commerce. This is indeed a strange contention in view of the binding construction placed upon the ordinance by the Supreme Court of Illinois as limited to purely intracity freight, *i. e.*, where point of origin and point of destination are both within the corporate limits of the city (R. 24-25).

The case of *Cooney* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934, (Resp. Br., pp. 12-13), has likewise been distinguished in our petition (p. 17) on the ground that there the local taxing statute was held invalid because applying indiscriminately both to local and interstate business. The tax there was imposed upon each telephone instrument used in furnishing telephone service in the State of Montana, and this Court adverted to the fact that it did not appear that the statute had been construed by the state court (294 U. S. 384, at p. 398). This Court also pointed out the distinction between the two cases of *State* v. *Rocky Mountain Bell Telephone Co.*, 27 Mont. 394, 71 Pac. 311, where the state court construed the statute to apply only to telephone instruments used in purely intrastate business and held it to be valid, and *State* v. *Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, where the state court held the occupation tax void because it applied indiscriminately to interstate as well as to local transportation (294 U. S. 384, at pp. 388-389.) This

Court held the tax in the *Cooney* case invalid for the following explicit reasons (294 U. S. 384, at pp. 390-391):

> "No distinction is made between interstate and intrastate service.
>
> • • • • • •
>
> "Again, there is no limitation as to use, control or operation in intrastate business.
>
> • • • • • •
>
> "The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate.
>
> • • • • • •
>
> "All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax."

The ordinance in the case at bar is not subject to this objection because, by its terms and as construed by the Supreme Court of Illinois, it limits its operation to vehicles only in so far as they are used in intracity business and does not attempt to tax vehicles used exclusively in interstate commerce.

Respondent contends that the ordinance seeks to tax trucks that carry both intrastate and interstate freight at the same time. That, however, is not within the express design of the ordinance, but a consequence of the use of the same vehicles in both types of operation. It is important to note in this connection that no part of the tax levied by the ordinance is referable to any interstate business in which a vehicle may be used, but only with respect to its use in intracity transportation in the purely local sense of that term. The fact that the respondent carries both local and interstate freight in the same vehicles at the same time does not, we submit, serve to destroy the city's power to

tax the vehicle by reason of its use in intrastate commerce in the absence of a showing that the tax either in character or amount imposes an undue burden upon respondent's interstate operations.

IV. (Reply to Point III).

There is no evidence whatever that the ordinance as applied to respondent's business constitutes an undue burden upon interstate commerce, and the fact that the tax is in the form of a flat annual fee upon each vehicle rather than a percentage of annual gross receipts does not establish that such a burden exists.

Respondent argues that proof of undue burden is unnecessary in this case because the flat annual tax imposed upon each vehicle is really a tax upon the vehicle's entire operations both intrastate and interstate. However, as already pointed out, the ordinance both in terms and as construed by the Supreme Court of Illinois is limited to the use of the vehicle in local commerce, and to no extent does the ordinance impose or seek to impose any portion of the tax with reference to the use of the vehicle in interstate commerce. Consequently, the fact that the tax is a flat impost on the vehicle rather than measured by a percentage of gross receipts from the local business does not render the tax invalid *per se* as a burden upon interstate commerce, especially since this Court has held that inseparability between both classes of commerce does not necessarily indicate that a local tax upon the intrastate operations casts any undue burden upon the interstate portion of the business. (*Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission,* 297 U. S. 403, 80 L. ed. 760).

Nor does the fact that the proportion of intracity and interstate business may not be the same for each vehicle,

or varies during different periods in the use of the same vehicle, have any material bearing upon the question. As this Court has said in *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439:

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. • • • One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." (295 U. S. 285, at p. 289).

It should also be pointed out that respondent's claimed preference for a tax measured by a percentage of gross receipts from local operations is not motivated by any desire to pay such a tax. Indeed, a tax based upon such a formula would introduce insuperable complexities in administration and enforcement which are obviated by the present flat annual charge upon each vehicle. According to the record here, respondent's executive vice president testified that respondent "does not keep any record to determine the proportion of interstate as compared to intrastate and local operations" (R. 12), and that "there is no way in which we can determine the proportion of local transportation as compared to interstate and intrastate" (R. 13). The Stipulation of Facts recites that there are more than 3,000 motor freight carriers in the City of Chicago "similarly situated" (R. 10). The City of Chicago was thus confronted with a difficult choice as to method, and it determined that a flat annual tax, reasonable in amount, upon each vehicle used in intracity transportation, and in accordance with its load-carrying capacity, was a fair and legally permissible formula.

This Court has recognized the difficulties confronting States and municipalities in gearing local taxes to relevant

factors, and has declared that the validity of a local tax should be judged by its result, not its formula; that the tax will be sustained if not shown to be unreasonable in amount (*Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 545; 94 L. ed. 1053); and that the burden of proof in this respect is upon a carrier who challenges the validity of the tax (339 U. S. 542, at p. 548).

Respondent has not shown that the moderate schedule of flat annual charges per vehicle based upon its load-carrying capacity is in excess of a reasonable fee for the privilege of its use in intracity commerce. Consequently, there is no basis for the contention that any portion of the tax constitutes a charge for the privilege of using the vehicle in interstate commerce. The ordinance, as construed, disclaims any such intention, and the record wholly fails to show that its application to respondent will produce any such unconstitutional result.

Conclusion.

It is accordingly respectfully submitted that the petition for a writ of certiorari should be allowed.

Respectfully submitted,

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